United States Court of Appeals

for the Second Circuit

APPELLEE'S BRIEF

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76-1056

To be argued by
DAVID A. DEPETRIS

United States Court of Appeals

FOR THE SECOND CIRCUIT

Docket No. 76-1056

UNITED STATES OF AMERICA,

Appellee,

—*against*—

AMADO LOPEZ,

Appellant.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NEW YORK

BRIEF FOR THE APPELLEE

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TABLE OF CONTENTS

PAGE

Preliminary Statement 1

Statement of Facts 2

A. Introduction 2

B. The Government's Direct Case 3

C. Appellant Lopez' Defense 7

D. The Government's Rebuttal Case 8

ARGUMENT:

POINT I—The trial court did not abuse its discretion in allowing the testimony of Ramiro Gonzalez in rebuttal 10

POINT II—The trial court did not abuse its discretion in sentencing appellant to fifteen years imprisonment 13

POINT III- The fact that a co-defendant pleaded guilty during the course of the trial does not require a reversal of appellant Lopez' conviction 17

POINT IV—Appellant's argument that an identification hearing is required is without merit 18

POINT V—The lapsed time between the alleged criminal acts and trial did not deprive appellant Lopez of his Fifth Amendment right to due process 19

POINT VI—The trial court properly denied appellant Lopez' motion to dimiss the indictment on Double Jeopardy grounds 21

CONCLUSION 23

TABLE OF AUTHORITIES

PAGE

Cases:

Dorszynski v. *United States*, 418 U.S. 424 (1974) .. 17

Jones v. *United States*, 307 F.2d 190 (3d Cir. 1962), *cert. denied*, 372 U.S. 919 (1963) 15

Kominski v. *Anderson*, 186 F. Supp. 404 (D.C. Del. 1960) 16

Lupo v. *Norton*, 371 F. Supp. 156 (D.C. Conn. 1974) 15

United States v. *Aronson*, 319 F.2d 48, (2d Cir.), *cert. denied*, 375 U.S. 920 (1963) 18

United States v. *Castellano*, 515 F.2d 505 (2d Cir. 1975) 13, 19

United States v. *Chestnut*, 2d Cir. Docket No. 75-1268 (March 8, 1976) 12

United States v. *Cifarelli*, 401 F.2d 512, (2d Cir.), *cert. denied*, 393 U.S. 987 (1968) 15

United States v. *Deaton*, 381 F.2d 114 (2d Cir. 1967) 12

United States v. *De Masi*, 455 F.2d 251, (2d Cir.), *cert. denied*, 404 U.S. 882 (1971) 21

United States v. *Doyle*, 348 F.2d 715 (2d Cir.), *cert. denied*, 382 U.S. 843 (1965) 15

United States v. *Eucker*, —F.2d— (2d Cir. March 8, 1976), slip, op. 2459 21

United States v. *Ewell*, 383 U.S. 116 (1966) 20

United States v. *Feinberg*, 383 F.2d 60, (2d Cir. 1967), *cert. denied*, 389 U.S. 1044 (1968) 20

United States v. *Ferrara*, 458 F.2d 868 (2d Cir.), *cert. denied*, 408 U.S. 931 (1972) 20

United States v. *Gerry*, 515 F.2d 130, (2d Cir. 1975) 12

PAGE

United States v. *Hendrix*, 505 F.2d 1233 (2d Cir. 1974), *cert. denied*, 423 U.S. 897 (1975) 16

United States v. *Herndon*, 525 F.2d 208 (2d Cir. 1975) 16

United States v. *Leonard*, 524 F.2d 1076 (2d Cir. 1975) 12

United States v. *Marion*, 404 U.S. 307 (1971) 20

United States v. *Mitchell*, 392 F.2d 214, 217 (2d Cir. 1968) 17

United States v. *Nathan*, 476 F.2d 456 (2d Cir.), *cert. denied*, 414 U.S. 823 (1973) 22

United States v. *Pacelli*, 470 F.2d 67 (2d Cir. 1972), *cert. denied*, 410 U.S. 983 (1973) 22

United States v. *Papa*, 2d Cir. Docket No. 75-1208 (April 2, 1976), slip. op. 2977 22

United States v. *Papadakis*, 510 F.2d 287 (2d Cir.), *cert. denied*, 421 U.S. 950 (1975) 12

United States v. *Pugh*, 509 F.2d 766 (8th Cir. 1975) 16

United States v. *Santiago*, 2d Cir. Docket No. 75-1179 (Jan. 12, 1976) 12

United States v. *Schwartz*, 2d Cir. Docket No. 75-1364 (April 20, 1976) 21

United States v. *Schwarz*, 500 F.2d 1350 (2d Cir. 1974) 14

United States v. *Tramunti*, 513 F.2d 1087 (2d Cir.), *cert. denied*, 423 U.S. 832 (1975) 17

United States v. *Trapnell*, 495 F.2d 22 (2d Cir.), *cert. denied*, 419 U.S. 851 (1974) 11

United States v. *Weiner*, 418 F.2d 849 (5th Cir. 1969) 16

United States v. *Weston*, 448 F.2d 626 (9th Cir. 1971), *cert. denied*, 404 U.S. 1061 (1972) 14

United States Court of Appeals

FOR THE SECOND CIRCUIT

Docket No. 76-1056

UNITED STATES OF AMERICA,

Appellee,

—against—

AMADO LOPEZ,

Appellant.

BRIEF FOR THE APPELLEE

Preliminary Statement

Appellant Amado Lopez appeals from a judgment of conviction entered January 9, 1976 in the United States District Court for the Eastern District of New York (Mishler, *Ch. J.*), after a five week jury trial, which judgment convicted appellant of a conspiracy to import and distribute large quantities of heroin in violation of Title 21, United States Code, §§ 173 and 174.[1] Lopez

[1] The indictment charged 17 defendants with a conspiracy to import and distribute large quantities of heroin from January 1968 to December 1970. Eight of the defendants are fugitives; four pleaded guilty (one of those four during the trial); one was severed; two were acquitted after trial (Teodoro Caceres and Jose Mendez); and two, Raul Castellano and Gilberto Fernandez, have previously appealed their judgments of convictions to this Court (2d Cir. Docket No. 74-2573), which appeal was affirmed on April 15, 1975 by this Court from the bench at oral argument (515 F.2d 505).

was sentenced to 15 years imprisonment (said sentence to run concurrently with a sentence imposed by the United States District Court for the Southern District of Florida on another charge on October 5, 1971). Lopez is in custody.[2]

On this appeal, appellant Lopez raises the following arguments: (1) the trial court abused its discretion in admitting similar act testimony in the Government's rebuttal case; (2) the trial court abused its discretion in sentencing appellant Lopez; (3) appellant Lopez was prejudiced by the guilty plea of co-defendant Domingo Coca during the trial; (4) the trial judge erred in denying appellant Lopez' motion to dismiss the indictment on double jeopardy grounds; (5) Lopez was prejudiced by an alleged pre-indictment delay; and (6) this Court should remand to the District Court for an identification hearing.

Statement of Facts[3]

A. Introduction

Appellant was charged with and convicted of an ongoing conspiracy to import and distribute large quantities of heroin from January 1968 to December 1970. The role of appellant in this massive narcotics operation can

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[2] Appellant Amado Lopez, who had been convicted by the jury in the case with Castellano and Fernandez, escaped from the Federal Detention Center in Manhattan after he had been convicted and while awaiting sentence. He remained a fugitive until shortly before January, 1976 when he was apprehended in Miami, Florida and subsequently returned to the Eastern District of New York for sentencing by Chief Judge Mishler.

[3] The Government's Statement of Facts is similar to its Statement of Facts in *United States* v. *Raul Castellano* and *Gilberto Fernandez*, 2d Cir. Docket No. 74-2573, at least with respect to the overall operation of the conspiracy, although the references to appellant Lopez are more detailed in the instant Statement of Facts.

be described as that of a receiver and distributor of heroin for the organization. Segundo Coronel, Manuel Noa and Roberto Arenas, co-conspirators who testified for the Government, held the following positions: Coronel, a wholesale distributor; Noa, a distributor and "stash" for the heroin; and Arenas, an assistant and confidante to Coronel.

B. The Government's Direct Case

The evidence offered at the trial through the testimony of Coronel, Noa and Arenas was in substance as follows:

In approximately January 1968, in Madrid, Spain, Luis Calabrese, who was a fugitive at the time of trial, gave Segundo Coronel some money and an airline ticket to travel to the United States from Spain. Calabrese directed Coronel to obtain for him heroin customers in the New York metropolitan area (T. 82-87).[4]

A couple of months later Coronel met Manuel Noa in New York City by chance and they discussed Coronel's future heroin business and Noa's ability to obtain customers (T. 88-90, 803).[5]

In approximately June 1968, one Florencio Gonzalez, who was in charge of heroin distribution in the United States met (through Calabrese) with Coronel in New York and the heroin distribution operation began to bloom shortly thereafter (T. 111-117). Initially, the quantity of heroin received by Coronel from Gonzalez was relatively small (two kilos) but it soon became apparent to Gonzalez

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[4] References to "T" are to pages of the trial transcript.

[5] Over the next couple of months, Coronel continued in his attempts to obtain customers for Calabrese through Manuel Noa and other individuals.

that Coronel through his connection with Noa and others could "move" large amounts (T. 118-119, 130-132).[6] From June 1968 to November 1968 Coronel distributed the heroin which he was receiving to various customers, Noa receiving the majority of the heroin (T. 111-117, 133-134, 139-141, 183-184, 804-811).[7]

Towards the end of November 1968, Coronel requested Noa to take over additional responsibilities in connection with the heroin the organization was receiving from Dino Romano. Coronel asked Noa if he could store all of the heroin from each shipment received and distribute it to Coronel's customers as per his instructions as well as to Noa's own customers. Noa was to be paid $500 per kilogram for this additional assistance. In order to be able to store such large amounts, Noa and one of his associates built a large trap in the wall of the living room in the apartment which he utilized as a base for his own distribution. A photograph of this trap was introduced at the trial (T. 186-187, 811, 814, 889-891).

Over the next several months, the operation continued to flourish with shipments of heroin arriving every 25 to 40 days. Coronel or one of his associates (Noa or Roberto Arenas) received approximately 25 to 30 kilos on each of these occasions and distributed it to the various customers (T. 185-187, 193-202, 815-818, 1800-1805).

In approximately June 1969, Coronel instructed Noa and Arenas to go to Kennedy Airport to receive a ship-

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[6] During the summer of 1968, Coronel was introduced to Dino Romano by Florencio Gonzalez. Romano was to take Gonzalez' place when the latter subsequently left for South America for reasons of ill health. (T. 136-137). Gonzalez has since died.

[7] In June Coronel received two kilos of heroin; in July three kilos (Noa got two of them); in August ten kilos (Noa got six); in September 25 kilos (Noa got five); and in November 25 kilos (Noa got 5).

ment of heroin from Dino Romano. Subsequent to the pick-up, Noa and one of his assistants went back to Noa's apartment in Manhattan and tested the heroin and stored it for Coronel. Thereafter, Noa distributed the heroin to the organization's various customers on Coronel's instructions. Of this heroin, Noa travelled to Miami and delivered approximately 1 2 kilogram of heroin to appellant Amado Lopez.[8] Approximately four to five days after Noa delivered the half kilo to appellant Lopez, Lopez met with Noa in Miami and paid Noa approximately $9,000 in cash. (T. 202-207, 818-833, 1806-1808). In approximately late July 1969, Noa received between 25 and 31 kilos of heroin from one of Coronel's associates and subsequently delivered the heroin as per Coronel's instructions to the various customers. Of this shipment, Noa again delivered approximately 1/2 kilo of heroin to appellant Lopez in Miami, Florida. The delivery followed the same basic course as it had on the previous shipment in June 1969 (T. 204-207, 833-838, 840-841, 852-854, 858-860, 1911-1912).

In September 1969 the organization received approximately 41 kilos of heroin from Dino Romano in New York. Coronel contacted Noa who was in Miami and asked him to come to New York to arrange for the

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[8] Noa had met appellant Lopez in Miami, Florida in approximately 1967. Prior to this delivery of ½ kilogram of heroin to Lopez Noa had met with him in New York (June 1969) and had discussed with Lopez at that time the possibility of Lopez purchasing quantities of heroin from the organization. Approximately two to three days before Noa went to Miami he telephoned Lopez from New York to advise him of the impending delivery of the ½ kilo of heroin. Upon Noa's arrival in Florida he delivered the ½ kilogram to appellant Lopez in the vicinity of his (Lopez's) cafeteria (T. 802, 830-832).

distribution of this shipment.[9] This shipment of heroin was distributed by Arenas and Noa as per Coronel's instructions; however, appellant Lopez did not receive any of this shipment. (T. 208, 223-225, 860-862, 1912-1913). So too in November 1969 the organization received 25 kilos of heroin and it was distributed as per the instructions of Coronel by Noa. Of this shipment, Noa sold two kilos to appellant Lopez in the vicinity of 171st Street and Broadway, New York City, as per previous arrangements made by appellant and Noa. When the delivery was made appellant Lopez paid Noa $10,000 in cash and subsequently paid installments of $7,500 cash and $5,000 cash.[10] Noa testified that appellant Lopez, while living in Miami, Florida, maintained an apartment during this time in New York City at 163rd Street (T. 225-230, 862-868, 874). Again in December 1969 the organization received an additional 25 kilos of heroin from Dino Romano.[11]

Thereafter, the operation continued with some minor difficulties until approximately December, 1970 when Noa was arrested. (T. 230-244, 875-881, 889-895, 909-911, 946-959, 1917-1918, 1921-1922).[12]

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[9] Manuel Noa in approximately July 1966 moved from New York to Miami, Florida. Thereafter, Noa commuted from Miami to New York on various occasions in connection with the heroin business. Noa owned a house in Miami and maintained two or three apartments in the New York metropolitan area to store the narcotics and for social purposes.

[10] Noa testified that appellant Lopez still owed him approximately $12,500 cash from this particular transaction (T. 866).

[11] Prior to the first transaction with appellant Lopez, Noa and he had a conversation in Miami where Noa described the organization's heroin as French and Lopez responded that he would try it out first with a ½ kilo quantity. (T. 910).

[12] Coronel, Noa and Arenas corroborated each other to a substantial extent as to the operation and transactions conducted by the organization between June of 1968 and December 1970.

During the cross examination of Noa by appellant Lopez' attorney, Noa was questioned as to whether he had any dealings with Lopez (narcotics) in 1968,[1] Noa's response was that he had several small transactions with appellant Lopez in 1968, but not concerning heroin (T. 1599-1600).

C. Appellant Lopez' Defense

Although appellant Lopez did not testify in his own behalf he did call certain witnesses in his defense. Isaac Rivero, an employee of appellant Lopez at the latter's cafeteria in Miami, Florida, testified that Lopez hired him in 1966 as a waiter in the cafeteria and he worked a shift from 11:00 at night until 7:00 in the morning. He further testified that he was working at the cafeteria in 1968 and 1969 except for a short period of time when he wasn't there. Rivero testified that he sometimes relieved appellant when he came to work at 11:00 o'clock at night and that he (Rivero) worked six days a week. Rivero testified on cross examination that he only worked at the cafeteria at night and knew nothing of appellant Lopez' activities, as Lopez generally was not there during that period of time (T. 2462-2470).

Rigoburto Diaz testified that in June 1968 he came to Miami, Florida and was hired by appellant Lopez to work in his (Lopez' cafeteria) as a cook for the second half of 1968, all of 1969 and 1970. He further testified that he worked a shift from 3:00 in the afternoon to 11:00 at night. In addition he testified that on occasion when he came to work he would relieve appellant and on other occasions he would relieve appellant's brother (T. 2517-

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[1] As appears from the testimony of Noa, Lopez' dealing with the organization were in 1969.

2522).[14] In addition, Lopez' attorney questioned both Rivero and Diaz as to whether appellant Lopez ever had a conversation with anyone on the phone or at the cafeteria in Miami concerning heroin, whether or not Lopez had ever been to New York and further whether Lopez had ever met with or spoken with Manuel Noa (T. 2467-2468, 2520-2521).

Eduardo Ochoa, who had served time in prison with Manuel Noa and who had been convicted with Manuel Noa in the Southern District of Florida for violations of the Federal Narcotics Laws, testified to a conversation with Noa to the effect: "Tell your friend Amado Lopez I have an indictment for him." (T. 2501-08, 2514-17).[15]

Aurora Garcia testified that appellant Lopez had a brother Amando. She further testified that appellant and Amando Lopez had a strong familiar resemblance (T. 2918-2921).[16]

D. The Government's Rebuttal Case

Ramiro Gonzalez testified in rebuttal as to various defendants who were on trial including Gilberto Fernandez, Jose Mendez and appellant Amado Lopez. As to

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[14] Through the testimony of Rivero and Diaz appellant Lopez attempted to establish that he had never left Miami to come to New York (this would have contradicted the testimony of Noa to the affect that he had delivered 2 kilos of heroin in 1969 to Amando Lopez in New York). Through the testimony of Ochoa, appellant Lopez attempted to establish a motive for Noa to lie in implicating Lopez.

[15] Appellant Lopez' attorney was obviously attempting to infer from this testimony that Noa had a motive for lying when he implicated appellant Lopez in this narcotic conspiracy.

[16] Obviously this witness was intended to give the impression to the jury that Manuel Noa and Ramiro Gonzalez had falsely or mistakenly identified appellant for his brother Amando Lopez.

appellant Lopez, Gonzalez testified that he first met Lopez in early 1969 in Miami, Florida. Gonzalez later saw Lopez in New York in approximately April or May of 1970 in front of the 005 Bar on 161st Street and Broadway. Lopez at that time was driving a 1969 Grand Prix Pontiac (Noa had testified that Lopez used such a car during one or two of the heroin transactions). On that occasion in New York, Gonzalez and appellant Lopez had a conversation concerning a quantity of heroin that Gonzalez was holding. In substance they agreed that Lopez would purchase approximately 3 kilos of the heroin. However, the transaction never took place because of a disagreement as to the price per kilo for the heroin. Subsequently, in or about October, 1970, Gonzalez had a conversation with Manuel Noa concerning Amado Lopez (Gonzalez testified that he had previously had similar conversations concerning Lopez with Noa). Gonzalez testified that the substance of the conversation was as follows:

He complained to Noa concerning the fact that the latter owed Gonzalez Fifteen Thousand Dollars for previous narcotics transactions and that Noa indicated that he had problems because a substantial amount of his money was tied up in the narcotics business; more specifically, Lopez owed Noa Twelve Thousand Five Hundred Dollars for two kilos of heroin that Noa had sold Lopez in New York previously. Noa told Gonzalez that the only way he (Gonzalez) would collect the money owed by Noa to him was if Gonzalez collected the Twelve Thousand Five Hundred Dollars from Lopez (which Lopez owed Noa). Thereafter, in late October or early November, 1970 Gonzalez met with appellant Lopez at the Paramount Hotel on 6th Avenue and 46th Street in New York. At that time, Gonzalez confronted Lopez with the debt owed by Lopez to Noa and Lopez agreed to pay the money but indicated that Gonzalez would have to wait until Lopez

returned to Miami for payment. A few days later Gonzalez went to Miami and had two or three conversations with appellant Lopez in an attempt to obtain the Twelve Thousand Five Hundred Dollars but Lopez indicated that all his money was tied up. Gonzalez never received the money from appellant Lopez. (T. 2675-2688, 2703-2706, 2714-2715).[17]

ARGUMENT

POINT I

The trial court did not abuse its discretion in allowing the testimony of Ramiro Gonzalez in rebuttal.

Appellant Lopez argues that the trial court erred in allowing Ramiro Gonzalez to testify in rebuttal to various narcotics related conversations which he had with appellant Lopez during the period of time involved in the conspiracy charge. This argument by appellant, it is submitted, is without merit.

Gonzalez' testimony was highly relevant for two reasons. First, Manuel Noa had testified that he delivered two kilos of heroin to Lopez in November 1969 in New York. Noa further testified that he was paid by Lopez in installments of $10,000, $7,500 and $5,000. Further, Noa testified that Lopez still owed him $12,500 for that particular transaction and that he had never collected it. Gonzalez testified that in approximately

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[17] Exhibits were offered to corroborate the meeting between appellant Lopez and Ramiro Gonzalez at the Paramount Hotel in October 1970 (T. 2838-2839 [Government's Exhibit 39]; 2852-2857, 2861 [Government's Exhibits 40 & 41]).

October 1970 he had a conversation with Noa to the effect that Lopez owed Noa $12,500 for a heroin transaction of two kilos which had previously taken place. Gonzalez further stated that Noa said that the only way Gonzalez would receive payment on a debt owed by Noa to him was if Gonzalez collected the $12,500 owed to Noa by Lopez. Thereafter Gonzalez testified he met with Lopez in New York at the Paramount Hotel and demanded the $12,500 from Lopez. Lopez at that time told Gonzalez that he would have to go to Miami for payment of this money; Gonzalez met with Lopez in Miami a few days later but Lopez did not pay because his money was tied up in other transactions.

Gonzalez' testimony was both relevant and material and related to the very transaction which was the subject of this conspiracy trial. The fact that he was called in rebuttal is not, it is submitted, a basis for finding an abuse of discretion by the trial court when the testimony was so clearly relevant to the very issue and charge presented in this case. It was within the trial court's discretion to allow this testimony in rebuttal where there had been a substantial attack on the credibility on the chief Government witness against appellant Lopez. *United States* v. *Trapnell*, 495 F.2d 22 (2d Cir.), *cert. denied*, 419 U.S. 851 (1974).

Second, Gonzalez also testified to a conversation with appellant Lopez in April or May 1970 in New York concerning a quantity of heroin which Gonzalez had for sale. Although the transaction was never completed, Gonzalez did testify to various conversations with Lopez concerning negotiations for the purchase of this quantity of heroin. Although this heroin was not specifically related to the heroin charge in the indictment, the testimony was clearly relevant and admissible in the trial court's discretion as a similar act on the issue of knowledge and in-

tent. *United States* v. *Deaton*, 381 F.2d 114 (2d Cir. 1967).[18] Indeed the trial court allowed the testimony of Gonzalez on the ground that the witnesses called by Lopez in his defense were an attempt to show that Lopez was not in New York and that he was not in the narcotics business.[19] The court admitted the testimony as to the other heroin transaction (the one other than the meeting concerning the $12,500) on the issue of the appellant Lopez' "knowledge" and "intent" to enter into the conspiracy.[20] Concerning the meeting with Lopez as to the $12,500 the court found that this testimony concerned the very transaction involved in this conspiracy and was admissible to prove the existence of this conspiracy. It is submitted that the court's ruling on Gonzalez' testi-

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[18] For the most cases on similar acts, see *United States* v. *Chestnut*, 2d Cir. Docket No. 75-1268 (March 8, 1976); *United States* v. *Santiago*, 2d Cir. Docket No. 75-1179 (Jan. 12, 1976); *United States* v. *Leonard*, 524 F.2d 1076 (2d Cir. 1975); *United States* v. *Gerry*, 515 F.2d 130 (2d Cir. 1975); *United States* v. *Papadakis*, 510 F.2d 287 (2d Cir.), *cert. denied*, 421 U.S. 950 (1975).

[19] Further, this testimony was admissible in rebuttal in view of the defense offered by appellant Lopez. Rivero and Diaz, who were called as defense witnesses, testified that appellant Lopez was in Miami during the periods of time Noa claimed he met with Lopez in New York. Further, these witnesses testified or at least the purpose of calling them was for the purpose of showing that Lopez did not have conversations concerning narcotics in Miami. Thus Gonzalez' testimony as to his meeting with appellant Lopez in New York rebutted the argument which Lopez was attempting to put forth to the jury that he had not been in New York. In addition to Gonzalez, the hotel records of the Paramount Hotel were offered to corroborate Lopez' presence in New York.

[20] In addition to Gonzalez' testimony against appellant Lopez, he further testified as to various dealings with Gilberto Fernandez and meeting with Jose Mendez who were also on trial in this case.

mony concerning Lopez can not in any way be said to be an abuse of discretion.[21]

POINT II

The trial court did not abuse its discretion in sentencing appellant to fifteen years imprisonment.

Appellant contends that Chief Judge Mishler abused his discretion and considered impermissible factors in sentencing Lopez to a term of fifteen years in prison. Specifically, appellant claims that the sentencing judge erroneously considered (1) the fact that Lopez had escaped from prison—a crime to which Lopez pleaded guilty and was sentenced to two years imprisonment to run consecutively with the sentence herein; and (2) his belief that defendant suborned perjury in the trial testimony of Ms. Aurora Garcia. Appellant further notes that he received a longer sentence than any of the other defendants convicted in the trial below.

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[21] It should be noted that the question of Gonzalez' testimony was likewise raised by Gilberto Fernandez in his appeal to this Court from the judgment of conviction in this case, and this Court rejected Fernandez' argument that the trial court had abused its discretion in admitting the testimony of Gonzalez in rebuttal. See *United States* v. *Castellano*, 515 F.2d 505 (2d Cir. 1975) (affirmed without opinion). In fact, appellant Lopez' attorney in this case at the trial and on appeal represented one of the defendants in the prior appeal of this case (Raul Castellano) where this very issue was raised. Under these circumstances, we believe that the decision in *Castellano, supra*, though unreported (see Rule 0.23 of the Rules of this Court) may properly be cited as precedent.

Appellant's contentions are not only unpersuasive, but they have no support in the sentencing minutes or case law cited.[22]

(1)

There is no indication in the record that the trial judge expressly considered or relied upon the fact that Lopez escaped from prison in determining his (Lopez') sentence. Chief Judge Mishler's comments quoted by appellant are taken out of the context of the sentencing proceedings and therefore distorted and twisted to justify appellant's allegations. Defense counsel introduced the topic; however, the ensuing discussion does not focus on the escape but rather on defendant's conduct during the period subsequent to the escape. Defense counsel asked the trial judge

> "... to be as merciful as possible and do not take into consideration, if at all possible, the fact that he did escape because, indeed, he will be punished for that ... He was, of course, wrong and pleaded guilty to the escape. But the fact remains

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[22] Appellant points to *3 Hofstra L. Rev. 867* (Summer 1975) which actually is contrary to his position and which concludes that notwithstanding *United States* v. *Schwarz*, 500 F.2d 1350 (2d Cir. 1974), the appellant court will remain reluctant to override the discretion of the District Court in sentencing. Moreover, *United States* v. *Schwarz* is distinguishable from the instant case. In *Schwarz* the Court's explication indicated the use of a fixed mechanical approach in refusal to apply the Youth Corrections Act rather than careful appraisal of variable components relevant to sentence upon an individual basis.

Nor does *United States* v. *Weston*, 448 F.2d 626 (9th Cir. 1971), *cert. denied*, 404 U.S. 1061 (1972), support the defendant Lopez' theory. In *Weston*, the trial judge unquestionably predicated the sentence on uncorroborated, unimportant information in the presentence report. In the case at hand there is no evidence that the appellant's sentence was based upon the challenged factors or upon any misinformation.

> that he was not involved in narcotics for one year, and spent the time with his wife and family.'

Clearly, defendant's escape was not a factor considered by the trial judge in determining the sentence. Moreover, to dispel any doubts that unfounded inferences concerning defendant's life style during this period were relied upon, Judge Mishler stated: ". . . I won't charge him with any crime that I know nothing about." Appellant's argument would fail even if Judge Mishler did consider the fact that defendant had escaped. It is well established that in sentencing it is permissible for the trial judge to consider defendant's criminal background, even those crimes not resulting in conviction. See *United States* v. *Cifarelli*, 401 F.2d 512 (2d Cir.), *cert. denied*, 393 U.S. 987 (1968); *United States* v. *Doyle*, 348 F.2d 715 (2d Cir.), *cert. denied*, 382 U.S. 843 (1965); *Jones* v. *United States*, 307 F.2d 190 (3d Cir. 1962), *cert. denied*, 372 U.S. 919 (1963). Furthermore, the sentencing judge may consider a wide range of information, including information bearing no relation whatever to the crime with which defendant is charged. *Lupo* v. *Norton*, 371 F. Supp. 156 (D.C. Conn. 1974).

(2)

That the trial judge at the time of sentencing mentioned his belief that defendant suborned perjury does not support defendant's allegation that the trial judge considered improper material in imposing the sentence since there is nothing in the minutes evidencing that the trial judge based the sentence upon this factor. Although the trial judge may have allowed himself to be drawn somewhat too much into argument with defendant's persistent counsel over whether defendant manipulated the perjured testimony, there is no indication that the trial judge relied on this assumption or that it was more than

an unnecessary verbal altercation.[23] An example is Judge Mishler's response to defense counsel's provocation; "but when you tell me about how rational and truthful this man is, I say that is a misrepresentation. I think he is closer to one other side." Even if this assumption was untrue, there was no error committed during sentencing unless it is shown that the trial judge relied upon this information in its determination. *United States* v. *Weiner*, 418 F.2d 849 (5th Cir. 1969). Appellant has not met this burden. Moreover, Judge Mishler stated: "I'm considering only the participation in the conspiracy and his record." Thus, the Government maintains that there is no indication in the minutes that the trial judge increased defendant's sentence because of his belief that defendant suborned perjury.[24]

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[23] *See*: *United States* v. *Herndon*, 525 F.2d 208 (2d Cir. 1975); *Kominski* v. *Anderson*, 186 F. Supp. 404 (D.C. Del. 1960) (In prosecution for armed robbery, defendant was not prejudiced by the Court's reference to him as an habitual criminal when imposing sentence in the absence of a showing that the sentence was one that could not have been imposed for robbery and could only have been imposed as a habitual criminal); and *United States* v. *Pugh*, 509 F.2d 766 (8th Cir. 1975) (Fact that trial judge at time of sentencing mentioned several prior arrests of defendant which defendant and counsel had opportunity to and did comment upon would not support allegation that trial judge considered improper material in imposing sentence where there was no indication that the trial judge based the sentence upon those arrests.

[24] Even assuming that the record was contrary to the Government's contention, that sentencing procedure was still proper. It is conceded that perjury should not be treated as an adverse sentencing factor unless the judge is persuaded beyond a reasonable doubt that the defendant committed it. *United States* v. *Hendrix*, 505 F.2d 1233 (2d Cir. 1974), *cert. denied*, 423 U.S. 897 (1975). The trial judge was in the best position to observe Ms. Garcia's testimony. The judge had no doubt that she lied and that defendant suborned this perjured testimony. It would be unreasonable to believe that the defendant had no part in the choosing and preparation of his own witness.

(3)

The trial court did not abuse its discretion by imposing a fifteen year sentence. If the sentence is within the maximum prescribed by law, it is beyond the control of the reviewing court, except in extraordinary circumstances, to vacate or modify the sentence. *United States* v. *Tramunti*, 513 F.2d 1087 (2d Cir.), *cert. denied*, 423 U.S. 832 (1975); *Dorszynski* v. *United States*, 418 U.S. 424 (1974). In the instant case, the defendant committed a serious crime where the maximum possible sentence was twenty years. Moreover, the length of the sentences of the other defendants are irrelevant. "Sentences should not be meted out on the basis of a comparison study . . ." *United States* v. *Mitchell*, 392 F.2d 214, 217 (2d Cir. 1968). There were obviously other aspects, such as no prior involvement with the law, as to the other defendants convicted.

POINT III

The fact that a co-defendant pleaded guilty during the course of the trial does not require a reversal of appellant Lopez' conviction.

Appellant Lopez argues that the fact that a co-defendant pleaded guilty during the course of the trial requires this Court to reverse his conviction. It is submitted that this argument is lacking in merit.

Appellant Lopez in support of his argument contends that Coca and his attorney played such a significant role in the trial prior to the plea that in some way appellant Lopez was prejudiced by the fact that this co-defendant pleaded guilty. However, this contention by appellant Lopez is unsupported by the record. The trial of this

case commenced on August 19, 1974 and ended on September 18, 1974.[25] It is clear that the co-defendant and his attorney did not, as appellant contends, participate in any significant way in the case up to the time that he pleaded guilty. Further it should be pointed out that the jury was never told that the co-defendant had pleaded guilty. The case was not submitted to the jury for an additional three weeks for its consideration. Finally, appellant did not move for a mistrial at the trial when the plea occurred. Thus, it is submitted that appellant Lopez' argument on this point is totally lacking in merit and requires no further discussion by the Government.[26] See *United States* v. *Aronson*, 319 F.2d 48, 52 (2d Cir.), *cert. denied*, 375 U.S. 920 (1963).

POINT IV

Appellant's argument that an identification hearing is required is without merit.

Appellant Lopez argues that, for some reason, there is a necessity at this time for an identification hearing to determine whether appellant Lopez was the individual who was involved in the narcotics conspiracy. This argu-

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[25] The Jury acquitted two defendants in the instance case, Teodoro Caceres and Jose Mendez. On August 28, 1974 the co-defendant of which appellant Lopez complains pleaded guilty. During the interim, of approximately fourteen hundred fifty pages of testimony, Coca's attorney participated in a total of approximately 34 pages of cross examination, and, more directly in point, did not cross-examine the main Government witness against appellant Lopez, Manuel Noa. (T. 280-297, 729-735, 1136-1145).

[26] It should be noted that in the appeal of the other defendants who were convicted at the trial, Raul Castellano and Gilberto Fernandez (2d Cir. Docket No. 74-2573), which convictions were affirmed this point was not even raised.

ment is total lacking in merit and, indeed, frivolous. At the trial, both Manual Noa and Ramiro Gonzalez identified appellant as the individual with whom they had dealings concerning this narcotics conspiracy. It was clear from the testimony of Noa that appellant Lopez and he had been associates or had at the very least known each other since 1966. It was clear that Noa had had frequent contact with appellant Lopez from 1966 through 1970. Further it was clear that Ramiro Gonzalez had met with appellant Lopez on several occasions. The fact that appellant Lopez called a witness in his defense to testify that appellant had a brother who looked like him was simply part of appellant's defense which the jury rejected; a separate hearing on that defense was hardly necessary.

POINT V

The lapsed time between the alleged criminal acts and trial did not deprive appellant Lopez of his Fifth Amendment right to due process.[27]

Appellant Lopez claims a violation of his due process rights because the indictment was opened in February, 1974, slightly more than 3 years after the last overt act alleged in the indictment. The actual chronology of events shows that the sealed indictment was handed down by the grand jury in January, 1974. Less than two months later, the first defendants were arrested and the trial of appellant, before Chief Judge Mishler, along with the other defendants was begun on August 19, 1974.

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[27] This argument was raised in the prior appeal by other defendants from their judgments of conviction and as stated earlier this Court affirmed without opinion the judgments of conviction. *United States* v. *Castellano*, 515 F.2d 505 (2d Cir. 1975). See footnote 20, *supra*.

Thus, the total time elapsed between the opening of the indictment and the beginning of the trial was less than six months.

It is undisputed that the evidence contained in the sealed indictment was substantially based on information received from government witnesses Manuel Noa, Segundo Coronel and Roberto Arenas. Noa began his cooperation with the Government in early 1973 and Coronel and Arenas began to cooperate in mid-1973 (see Government's Exhibits 3500-1, 3500-6). Thus, nearly three years past before the United States was in a position to begin its investigation. Appellant Lopez points to nothing which indicates that the government's action in this case was "an intentional device to gain a tactical advantage over the accused" (*United States* v. *Marion*, 404 U.S. 307, 324 (1971)) and has alleged as prejudice simply the dimming of memories. This type of argument, the mere dimming of memories, is not sufficient to show that the delay was a deliberate tactical device to gain advantage. *United States* v. *Ferrara*, 458 F.2d 868, 875 (2d Cir.), *cert. denied*, 408 U.S. 931 (1972). The statute of limitations is the primary guarantee against the bringing of stale charges. *United States* v. *Ewell*, 383 U.S. 116, 122 (1966).

In this case, the government did not become aware of the conspiracy charged until early 1973 when Noa began cooperating. Subsequent investigation and preparation for presentation to the grand jury required substantially less than one year. In this context, this Court has noted that "careful investigation, even at the price of delay, is to be cherished, inasmuch as the time-consuming investigation prior to an arrest minimizes the likelihood of accusing innocent parties and may facilitate the exposure of additional guilty persons." *United States* v. *Feinberg*, 383 F.2d 60, 64-65 (2d Cir. 1967), *cert. denied*, 389 U.S.

1044 (1968); *United States* v. *DeMasi*, 455 F.2d 251, 255 (2d Cir.), *cert. denied*, 404 U.S. 882 (1971). It is submitted that there was no "contrived procrastination" by the government in this case to the prejudice of appellant. See *United States* v. *Schwartz*, 2d Cir. Docket No. 75-1364 (April 20, 1976); *United States* v. *Eucker*, — F.2d — (2d Cir. March 8, 1976), slip op. 2459, 2468.

POINT VI

The trial court properly denied appellant Lopez' motion to dismiss the indictment on Double Jeopardy grounds.

Appellant Lopez argues that the indictment in this case constituted a violation of his Fifth Amendment right against being twice placed in jeopardy. This argument is frivolous.

Appellant Lopez was convicted after trial in the Southern District of Florida in August, 1971 on an indictment charging him with violations of Title 21, U.S.C. §§ 841(a)(1) and 846. That indictment charged appellant in three counts as follows: Count One with conspiracy with one Thomas Llerena to possess two kilos of cocaine between May 6, 1971 and July 19, 1971 with intent to distribute (T. 21, U.S.C. § 846); Count Two with possession with intent to distribute the two kilos of cocaine on July 3, 1971 (T. 21, U.S.C. § 841(a)(1); and Count Three with possession of 3.6 grams of heroin on May 6, 1971 with intent to distribute (T. 21, U.S.C. § 841(a)(1).

The narcotics conspiracy charged and proved in this case concerned a far flung narcotics operation between January 1, 1968 and December 31, 1970, involving the importation, transportation, sale and distribution of

large quantities of heroin (T. 21, U.S.C. §173 and § 174). In addition to the 17 defendants who were charged in this case, the indictment named Manuel Noa, Segundo Coronel and Roberto Arenas as co-conspirators.

It becomes obvious that the only similarity between the case in the Southern District of Florida and the case in this District was that they were both narcotics offenses. The Florida case involved a conspiracy dealing with cocaine during 1971. The Eastern District case involved a conspiracy dealing with heroin between 1968 and 1970. None of the individuals named in the Eastern District indictment as defendants or co-conspirators were named in the Florida indictment and vice versa, with the exception of appellant. Further, an analysis of the testimony at the trial of this case and the trial of the Florida case indicates that there were no similarities as far as co-conspirators or time was concerned. Thus, it is clear that the conviction in the Southern District of Florida was not for the same offense, and indeed did not rely on any of the same overt act, narcotics or co-conspirators as appeared in the Eastern District case. *United States* v. *Papa*, 2d Cir. Doc. No. 75-1208 (April 2, 1976), slip op. 2977, 2984-2991; *United States* v. *Pacelli*, 470 F.2d 67, 72 (2d Cir. 1972), *cert. denied*, 410 U.S. 983 (1973); *United States* v. *Nathan*, 476 F.2d 456, 458 (2d Cir.), *cert. denied*, 414 U.S. 823 (1973).

CONCLUSION

The judgment of conviction should be affirmed.

Dated: June 16, 1976

Respectfully submitted,

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Eastern District of New York.

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* The United States Attorney's Office wishes to acknowledge the assistance of Stephanie Kogan in the preparation of this brief. Ms. Kogan is a third year law student at the Syracuse University Law School.

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COUNTY OF KINGS
EASTERN DISTRICT OF NEW YORK } ss

LYDIA FERNANDEZ being duly sworn, deposes and says that he is employed in the office of the United States Attorney for the Eastern District of New York.

That on the 18th day of June 19 76 he served ~~a copy~~ two copies of the within Brief for the Appellee

by placing the same in a properly postpaid franked envelope addressed to:

Stuart R. Shaw, Esq.
600 Madison Avenue
New York, N. Y. 10022

and deponent further says that he sealed the said envelope and placed the same in the mail chute drop for mailing in the United States Court House, ~~Washington Square~~ 225 Cadman Plaza East, Borough of Brooklyn, County of Kings, City of New York.

Lydia Fernandez
LYDIA FERNANDEZ

Sworn to before me this
18th day of June 19 76

Sylvia E. Morris
SYLVIA E. MORRIS
Notary Public, State of New York
No. 24-4503861
Qualified in Kings County
Commission Expires March 30, 19 77